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No. 96-1482

In The

Supreme Court of the United States

October Term, 1996

LEXECON INC., *et al.*,

Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

COTCHETT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED RELATIVE TO THE SEPARATE JUDGMENT IN FAVOR OF THE COTCHETT DEFENDANTS

1. Whether *certiorari* should be granted to review a separate judgment entered in favor of certain defendants resulting entirely from dispositive pretrial motions granted *before* the order of transfer for trial as to certain *other* defendants.

2. Whether *certiorari* should be granted to review the contention that the mere filing of a motion to refer to the JPML for remand divests the transferee court of authority to decide then pending dispositive pretrial motions.

3. Whether *certiorari* should be granted to vacate a summary judgment, litigated in a court with undisputed personal jurisdiction and venue, and where there is no claim of substantive error or showing of prejudice, so it can be re-litigated in another court (of dubious personal jurisdiction).

4. Whether *certiorari* should be granted to review a Rule 12(b)(6) dismissal of state law claims of malicious prosecution and abuse of process because the District Court took judicial notice of undisputed prior proceedings and orders in the underlying case.

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INTRODUCTION

The Petition obscures the record insofar as it concerns Petitioners' claims against Respondents Joseph W. Cotchett, Susan Illston, Cotchett & Pitre f/k/a Cotchett, Illston & Pitre ("Cotchett Defendants" or "Cotchett"). All of those claims were dismissed upon pretrial motions. The motions were made *before* Petitioners ("Lexecon") moved to refer for remand. The Orders granting those motions were entered *before* the Order of "permanent transfer" for trial of a claim by Lexecon against only the Milberg Defendants.

A separate judgment of dismissal was entered in favor of the Cotchett Defendants. Lexecon appealed from that judgment *before* the trial against the Milberg Defendants. The Cotchett Defendants, having previously been dismissed as parties to the case, were not parties to the trial.

There is no issue as to transfer for trial, or trial venue, or "permanent transfer," or "self-transfer" with respect to the Cotchett Defendants.

Although Lexecon does not directly raise an issue of the transferee Court's authority to decide pretrial dispositive motions, that issue is nevertheless an inherent part of its Petition for at least two reasons. First, Lexecon fails to distinguish the distinct claims, proceedings, and judgment with regard to the Cotchett Defendants on the one hand and the Milberg Defendants on the other. Second, what Lexecon seeks to achieve in petitioning for *certiorari* (and advocated in a footnote in the dissenting opinion below) is to vacate all orders, proceedings, and judgments of the transferee Court from August 5, 1994 to

December 12, 1995, including the summary judgment of April 24, 1995, and to recommence and re-litigate all of those matters in the District of Illinois.

STATEMENT OF THE CASE

This case, part of MDL Docket No. 834, District of Arizona, resulted in a number of appeals and proceedings in the Court of Appeals that were consolidated for hearing. Lexecon's separate appeal from the separate judgment entered in favor of Cotchett is Court of Appeals Docket No. 95-16403.

A. The Cotchett Defendants.

The Cotchett Defendants are residents of California. They do not do or solicit business in Illinois (CR 310, Ex. D).[1] The alleged acts in Illinois that Lexecon claimed gave rise to personal jurisdiction there were not committed by any of the Cotchett Defendants (*Id.*, Exs. E, F).

The Cotchett firm filed one of the early *Lincoln Savings* cases in California. It was transferred to Arizona and consolidated with others. The firm was appointed by the Court as one of several "co-lead" class counsel. Responsibility for prosecuting the claims against over 100 defendants was divided among class counsel. Lexecon was the Milberg firm's responsibility.

[1] "CR" refers to the record, or docket, by document number in the District Court.

Lexecon alleged below (after six months of discovery) that "Milberg Weiss" made the decision to add Lexecon as a defendant for the alleged ulterior purpose to create a "weapon" that "Milberg Weiss" could use to "extort unfair advantages" from Lexecon in other cases where Fischel was adverse to Milberg (CR 289, ¶¶ 36, 38). The Cotchett firm was not adverse to Lexecon in any other case. Mr. Fischel admitted in deposition that he had never even met Mr. Cotchett or Ms. Illston until the trial in *Lincoln Savings*, and that he had never encountered them in any other case (CR 484, Ex. B, 308/1-309/3, 309/4-314/3).

The original attorney engaged by Lexecon to prosecute this case testified that Lexecon never complained that any of the Cotchett Defendants were engaged in conduct which Lexecon claims caused it damage (CR 484, Ex. D). One of Lexecon's lawyers in *Lincoln Savings* testified that he did not know why the Cotchett Defendants were made part of this case (CR 484, Ex. F). He did not even know who they were (*Ibid*).

In Lexecon's Brief filed in the Court of Appeals on April 23, 1993, it stated that its case was based upon "acts of Milberg Weiss" (no mention of the Cotchett Defendants) (CR 484, Ex. G).[2]

[2] Lexecon's case against the Cotchett Defendants was based upon the theory of civil conspiracy which Arizona does not recognize. *Tovrea Land and Cattle Co. v. Linsenmeyer*, 412 P.2d 47, 63 (Ariz. 1966); *Hansen v. Stoll*, 636 P.2d 1236 (Ariz. App. 1981) (malicious prosecution); *Savard v. Selby*, 508 P.2d 773 (Ariz. App. 1973) (driving out of business); *Hirsch v. Cooper*, 737 P.2d 1092 (Ariz. App. 1986) (defamation).

B. Lexecon's nationwide business.

Lexecon and Fischel conduct a nationwide business of providing expert testimony and consulting for defendants in securities cases. The "vast majority" (Fischel's term) of its work involves cases pending outside of Illinois (CR 443, Ex. A at 358/15-24).

One of Lexecon's Arizona clients was Charles H. Keating, Jr. who became notorious nationwide as a perpetrator in what has become nationally known as the "savings and loan scandal." Lexecon provided reports for submission by Keating's Lincoln Savings to federal and state regulators touting Lincoln's financial condition.

C. Lexecon proceeds to trial in Arizona, settles, then sues class counsel in Illinois.

The consolidated class in *Lincoln Savings* alleged that Lexecon's reports for Lincoln were false, and that Lexecon thereby aided and abetted Keating/Lincoln in defrauding regulators. Thus, Lexecon was named as a defendant in the *Lincoln Savings* case. It litigated that case in Arizona for over two years, and proceeded to trial in Arizona. (The Arizona transferee Court transferred the case to itself for trial without objection from Defendant Lexecon).

In denying Lexecon's motion for summary judgment in *Lincoln Savings*, Judge Bilby found from the evidence that Lexecon had issued several reports on behalf of Lincoln which "rebutted regulatory criticism on material issues" (*In Re ACC/Lincoln*, 794 F.Supp. 1424, 1448 (D. Ariz. 1992)). Among other things, Lexecon reported that

"Lincoln is sound," and "safer than comparable thrifts" (*Ibid*). (*Cf. Lincoln v. Wahl*, 743 F.Supp. 901, 906 (D.C. 1990), where the Court found that: "It is abundantly clear that Lincoln was in an unsafe and unsound condition.")

The Court concluded that "the record raises material issues" as to whether the reports were "false or misleading when viewed as a whole" (*In Re ACC/Lincoln, supra*, 794 F.Supp. at 1448). Thus, "the record raises material questions concerning Lexecon's knowledge and intent to aid and abet a course of conduct violative of Section 10(b), RICO, AZRAC [Arizona RICO], and common law fraud" (*Id*. at 1449).

Lexecon's motion for a directed verdict was similarly denied (after four months of trial). Lexecon then told the Court that it did not want to have the case against it submitted to the jury. It wanted to settle in a discreet manner to avoid "stigma" (CR 18, Exs. B, K). Class counsel accommodated Lexecon, suggesting that the settlement be referred to as a "resolution" (CR 18, Ex. B). The Court accepted that and Lexecon thereby avoided the verdict ($3 billion, later reduced to $1.2 billion).

On November 25, 1992, a month after completing payment of in excess of $700,000 pursuant to the settlement, Lexecon filed this diversity case in Illinois against lead class counsel, collaterally attacking the Arizona case that it had settled.

D. The adjudication that Lexecon's complaint was false.

In its complaint, Lexecon alleged that the *Lincoln Savings* case "was terminated in Lexecon's and Fischel's [he was not even a defendant] favor," and that the settlement was an "implicit acknowledgment" by class counsel of the lack of merit in the complaint against Lexecon (CR 1; ¶¶ 92, 122).

Judge Bilby, who had continuing jurisdiction over *Lincoln Savings* settlements, held a hearing, and received briefs and affidavits with respect to those allegations. He then ruled, in an Order dated December 31, 1992 (Pet. App. 7a), that the allegations were false; that the fact was that Lexecon settled to avoid a "catastrophic verdict," and was not a prevailing party (CR 383, Ex. 3, fn. 1 – omitted in Ct. App. Op. at Pet. App. 7a).

Lexecon sought to appeal the Order of December 31, 1992, characterizing it as "tantamount to a declaratory judgment in favor of Milberg Weiss as defendants in [this] lawsuit" (Lex. 4/23/93 Ninth Cir. Br. 19). The appeal was dismissed as premature because a final judgment had not yet been entered in the *Lincoln Savings* case. In March, 1994, a final judgment was entered (CR 431, Ex. B). Lexecon did not appeal from that judgment.

E. MDL transfer to Arizona.

Lexecon's false allegations were of concern to the JPML in transferring the case to Arizona since they pertained directly to one of the settlements under Judge Bilby's continuing jurisdiction:

> "JUDGE POLLACK: * * * [T]hat [Lexecon] settlement is very much alive before Judge Bilby, and he has not recused himself from it.
>
> Speak to that.
>
> LEXECON'S COUNSEL: We still have to come back to the question of what is the Lexecon case in Chicago going to be consolidated or coordinated with. * * *
>
> JUDGE POLLACK: We can take care of that very simply by leaving the whole thing in Arizona where it belongs in the settlement. * * * " (CR 310, Ex. B, JPML Tr. 5/21/93, pp. 9-10).

Also of concern was that Lexecon's counsel told the Panel that the District Court in Chicago said that the Order of December 31, 1992 would not be binding in Illinois (CR 310, Ex. B, *supra*, pp. 12-13) (in effect, giving Lexecon an "horizontal appeal").

The final Transfer Order to Arizona was entered on June 3, 1993 (CR 122). Lexecon did not challenge it. It did not challenge the fact that the transferee Court had personal jurisdiction and proper venue over Lexecon and all Defendants. It never petitioned the Panel for remand.[3]

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[3] Under 28 U.S.C. § 1407(a) only "the Panel" can remand, not the transferee court. See *Antibiotic Antitrust Actions*, 538 F.2d 180, 196 and fn. 31 (8th Cir. 1976); Rule 14(c), JPML (transferee court can only "suggest" that the Panel remand).

F. The termination of the case against the Cotchett Defendants during pretrial proceedings.

On November 29, 1993, the transferee court in Arizona (Judge Roll) dismissed, on Rule 12(b)(6) motion, the first two counts of Lexecon's Amended Complaint: for malicious prosecution and abuse of process in the underlying Arizona *Lincoln Savings* case (Pet. App. 80a).

On January 14, 1994, the Cotchett Defendants filed a motion for summary judgment on all remaining counts (CR 186). Judge Roll granted Lexecon's Rule 56(f) application and allowed it approximately 10 months of (unrestricted) discovery before filing its opposition (CR 192, 234).

On August 9, 1994, after all defendants' motions for summary judgment were pending for eight months, Lexecon filed a motion to refer the case back to the JPML for remand to Illinois (CR 288). The motion was stayed with leave to renew at the close of discovery (CR 311). The Milberg Defendants moved for the stay. The Cotchett Defendants opposed the motion on the merits, and conditionally cross-moved for permanent transfer to Arizona (citing, among other things, the convenience of the Cotchett witnesses and the absence of personal jurisdiction over Cotchett in Illinois, CR 309).

In Mr. Fischel's deposition of October 27, 1994, he testified that a number of Lexecon witnesses would find Arizona a more convenient forum for trial than Illinois (CR 443, p. 9, fn. 2, Ex. C). Lexecon's Arizona counsel, who was its principal counsel during pre-trial proceedings, said "They'd rather come here [Tucson] than go to

Chicago" (*Id.* at third page of Ex. C). Fischel acknowledged that the trial might occur in Arizona: "Absolutely, may occur in Arizona" (*Ibid*).

Lexecon renewed its motion on November 4, 1994 (CR 409). All Defendants opposed on the merits and cross-moved for transfer to Arizona (CR 443, 444, 457, 487).

All motions for summary judgment were argued on April 6, 1995 (CR 580). On April 24, 1995, the Court granted the Cotchett motion for summary judgment in full, dismissing all remaining claims against them (Pet. App. 64a).

On May 1, 1995, the Cotchett Defendants lodged a separate Rule 54(b) judgment of dismissal (CR 585). Lexecon filed objections on May 8, 1995 (CR 587) challenging only the exercise of Rule 54(b) discretion. There was no challenge to the transferee court's jurisdiction or authority to enter a final judgment in favor of the Cotchett Defendants.

On May 5, 1995, the Court ruled on all venue motions. It entered a "permanent transfer" order for purposes of trial, *i.e.*, that the sole claim surviving summary judgment – a single defamation claim against Milberg Weiss resulting from a letter written to a newspaper by one of its lawyers – was to be tried in Arizona (Pet. App. 61a; CR 586).

On June 7, 1995, a separate Rule 54(b) judgment in favor of the Cotchett Defendants was entered (CR 602; Cotchett App. 1). Cotchett recovered costs (CR 604) and Lexecon paid the costs in full on June 22. On July 3, 1995,

Lexecon appealed from that separate judgment (Cotchett App. 2). In its Docketing Statement (Cotchett App. 3), it stated that it was appealing the merits of both the Rule 12(b)(6) and Rule 56 orders. There was no reference whatsoever to any issue pertaining to transfer for trial or remand. (The substantive appeal from the Rule 56 Order was abandoned.)

Thereafter, on July 25, 1995, Lexecon proceeded to try its defamation claim against Milberg Weiss and lost. Its appeal on August 1, 1995 from the judgment entered in favor of Milberg Weiss was consolidated in the Court of Appeals with Lexecon's prior appeal from the June 7, 1995 judgment in favor of Cotchett.

G. Lexecon invokes, and accepts the benefits from the transferee Court's dispositive motion jurisdiction.

On December 13, 1994, four months after Lexecon now contends the transferee Court lost all authority to rule on dispositive motions, it filed its own dispositive motion before Judge Roll and pursued it to a successful conclusion. The motion was one to dismiss Milberg Weiss' amended counterclaims (CR 477). The motion was not filed conditionally, or "without prejudice" to Lexecon's motion as to remand (*Ibid*).

Lexecon's motion to dismiss was granted in full (Pet. App. 77a-79a) (and affirmed on appeal, *Id.* at 28a-29a). Lexecon filed a Bill of Costs on August 18, 1995 alleging that, if the Milberg Defendants were entitled to recover costs in prevailing on Lexecon's claims, it should recover costs as the "prevailing party" on the Milberg Defendants' counterclaims (CR 691). Lexecon recovered its

costs in full, approximately $10,000, and that sum was deducted from the cost award to Milberg Weiss (Order, 11/13/95; Amended Judgment 12/12/95). Lexecon paid Milberg Weiss the net amount which was accepted as payment in full (Acknowledgment 1/11/96).

REASONS FOR DENYING THE WRIT AS TO THE SEPARATE JUDGMENT IN FAVOR OF THE COTCHETT DEFENDANTS

1. Further review is not warranted because a transferee court's authority to terminate a case by pretrial dispositive motion is uncontested and beyond challenge.

There is nothing about the exercise of that authority that calls for a nationally binding pronouncement to resolve conflict or clear up confusion in the lower courts. There is no conflict. There is no confusion.

2. *Certiorari* should not be granted to review the contention that the mere filing of a motion to refer to the JPML for remand divests the transferee court of authority to decide then pending dispositive pretrial motions.

There is no conflict or confusion in the lower courts with respect to such a contention. There is no authority or support for such a contention in the MDL statute, case law, or sound policy.

Moreover, if such a contention were accepted, it would empower a litigant to unilaterally terminate the

MDL process at any time he chooses, merely by filing a motion. That would undermine the MDL process.

3. *Certiorari* should not be granted to vacate a summary judgment, litigated in a court with undisputed personal jurisdiction and venue, where there is no claim of substantive error or showing of prejudice, so it can be re-litigated in another court (of dubious personal jurisdiction).

There is no conflict or confusion in the lower courts concerning a purported right to re-litigate in another district an error free adjudication by a court with jurisdiction and venue. On the contrary, this Court has recently and unanimously ruled that, absent a showing of prejudice, even erroneous venue decisions do not justify the cost, time, and resources for re-litigation. *Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996).

4. *Certiorari* should not be granted to review a Rule 12(b)(6) dismissal of state law claims of malicious prosecution and abuse of process because the District Court took judicial notice of undisputed prior proceedings and orders in the underlying case.

The challenged ruling is consistent with existing case law and practice in taking judicial notice of matters of public record. There is no conflict or confusion in the lower courts with respect to that practice. Lexecon's Rule 12(b)(6) argument was not even addressed by the dissenting Judge in the Court of Appeals.

Moreover, the challenged ruling turned on review of the particular record in a particular case and the application of state law. Even if the ruling were not correct, that

does not warrant *certiorari*. This Court does not sit to correct error in individual cases.[4]

I

FURTHER REVIEW IS NOT WARRANTED BECAUSE A TRANSFEREE COURT'S AUTHORITY TO TERMINATE A CASE BY PRETRIAL DISPOSITIVE MOTION IS UNCONTESTED AND BEYOND CHALLENGE.

An MDL transferee court's authority to adjudicate dispositive motions is confirmed by the language of the statute, its legislative history, MDL Rules, and unanimous case law. *See* 28 U.S.C. § 1407(a) (no remand if case "previously terminated"); 28 U.S.C. § 1407(b) (authority to conduct "pretrial proceedings"); H. Rep. No. 1130, 90th Cong. 2d Sess., *reprinted* in 1968 U.S.C.C.A.N. at 1900 ("the transferee court would have authority to render summary judgment"); Rule 14(a), JPML ("[a]ctions terminated in the transferee district court by valid judgment, including, but not limited to summary judgment . . . shall not be remanded . . . "); *Korean Airlines*, 829 F.2d at 1172, 1178 (D.C. Cir. 1987) (majority and concurring opinions);

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[4] We do not address Question No. 1 in the Petition because, as demonstrated *supra*, that question does not apply to the Cotchett Defendants. If it did, we would ask leave to join in the Milberg Defendants' Brief in Opposition. We endorse that Brief. On the question of venue for trial, we believe that the Milberg Defendants have correctly addressed the long-standing and universal practice by the Circuits that is consistent with the MDL statute and its purpose and policy. Lexecon's position in this regard is formalism above substance. Absent a showing of prejudice and a claim of substantive error, this is not the right case to test an academic argument universally rejected by all Circuits that have considered it.

numerous cases cited in Wright, Miller & Cooper, *Fed. Prac. & Proc.*: Jurisdiction 2d § 3866, n. 10 (1986) and 1996 pocket part; WM&C's Supp. Serv., 3/97 ("transferee court has the authority to enter dispositive orders terminating cases consolidated under 28 U.S.C. § 1407"); Manual for Complex Litigation (Third) § 31.132 at 253 (1995); Weigel, *The Judicial Panel on Multi-District Litigation, Transferor Court and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978).

The dissenting Judge in the Court of Appeals did not take issue with the foregoing authorities. He concurred:

> "It is true that an MDL court can dispose of a case by settlement or motion and thus prevent the JPML from remanding it. But that is a possibility expressly accounted for in section 1407(a), which releases the JPML from its obligation to transfer the case back to its originating district if 'it shall have been previously been terminated.' * * * Congress may have felt that federal judges are fungible for purposes of resolving legal questions . . . " (Pet. App. 39a, 41a).

II

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE CONTENTION THAT THE MERE FILING OF A MOTION TO REFER TO THE JPML FOR REMAND DIVESTS THE TRANSFEREE COURT OF AUTHORITY TO DECIDE THEN PENDING DISPOSITIVE PRETRIAL MOTIONS.

A. The contention.

The dissent below, after concluding that the District Court abused its discretion in transferring the remaining claim against Milberg "to itself" under 28 U.S.C.

§ 1404(a), concluded that: "We must therefore vacate that order and all *subsequent orders* entered by the district court including, of course, the final judgment entered after trial" (emphasis added) (Pet. App. 52a). That does not impact on the Cotchett Defendants since the orders dismissing all claims against them were entered *prior to* the transfer order.

However, the dissent, in a footnote that follows the quoted conclusion states (without citation to authority): "All orders" entered after Lexecon filed its motion to refer for remand "on August 5, 1994," "particularly the summary judgment granted on April 24, 1995, should be vacated." It is that supplemental conclusion in dissent footnote 22 that Lexecon urged in the Court of Appeals and what it seeks to achieve in this Court. That is the only part of the dissent that impacts on Cotchett.

B. The chronology.

The Cotchett motion for summary judgment was pending for eight months *before* Lexecon filed its first request to refer for remand. The delay in adjudication was an accommodation of *Lexecon's request* for ten months of discovery in order to file an opposition. The fact that the adjudication did not occur before Lexecon filed its first request to refer for remand is not the result of anything that the defendants did or the District Court initiated. It was the result of accommodating Lexecon's request for delay.

C. No basis in law or practice.

There is no basis in the MDL statute, its legislative history, case law, policy, or legal commentary, for the position that the mere filing of a motion to refer for remand divests the transferee court of authority it otherwise undisputedly has to decide pending dispositive pretrial motions. If Congress intended that the mere filing of a motion to refer for remand terminated the authority of the transferee court, it could easily have enacted such a provision.

Moreover, such a rule would undermine the MDL process. It would empower a litigant to unilaterally terminate proceedings in the transferee court (ordained by statute and ordered by the JPML) merely by filing a motion. If that were the case, the motion could be filed the day after transfer and preclude the transferee court from conducting the pretrial proceedings it is obliged to conduct by statute and JPML order.

D. No claim of substantive error or showing of prejudice.

Such a drastic rule would be particularly inappropriate where, as here, there is no assignment of error in the summary judgment and no showing of prejudice. Lexecon abandoned its appeal of the summary judgment in favor of Cotchett by not arguing it in its Opening Brief in the Court of Appeals. *E.g., Officers of Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725 (9th Cir. 1992). It made no attempt in the Court of Appeals, and makes no attempt in its Petition, to demonstrate that there was a material issue

of fact with respect to the counts dismissed on summary judgment.

Moreover, Lexecon made no attempt in the Court of Appeals, and makes no attempt in its Petition, to demonstrate actual prejudice as the result of the District Court in Arizona rather than the District Court in Illinois deciding the summary judgment motions (including Lexecon's own dispositive motion). To paraphrase the dissenting Judge below, federal judges are "fungible for purposes of resolving legal questions . . . " (Pet. App. 41a).

Lexecon may have a strategic *preference* for a particular federal judge, but it has no *right* to have any particular federal judge hear and decide motions.

Even if Lexecon's contention were tenable, and the mere filing of a motion for remand renders the transferee court an improper venue to decide pending motions, there is no authority that supports the position that an adjudication free of error and prejudice in a federal court with jurisdiction and venue should be vacated because of an alleged erroneous refusal to transfer venue. Indeed, this Court has recently settled the law to the contrary in its unanimous decision in *Caterpillar, Inc. v. Lewis, supra. See also, Montana v. U.S.*, 440 U.S. 147, 153-54 (1979) where this Court held:

> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

E. The transferor Court lacked personal jurisdiction over the Cotchett Defendants.

Additionally, here the transferor Court lacked personal jurisdiction over Cotchett. As indicated *supra*, they are California residents who do not do or solicit business in Illinois and none of the alleged acts in Illinois that Lexecon claimed were jurisdictionally significant were committed by them.[5]

In the transferor district, Milberg moved to dismiss for lack of jurisdiction and Cotchett joined in the motion (CR 15). The Court denied the motion in a lengthy opinion which found that Milberg Weiss conducted business in Illinois but which did not make any such a finding with respect to Cotchett (CR 107). There was no finding identifying a single act of the Cotchett Defendants in Illinois (*Ibid*). The Court held that the mere allegation of conspiracy was sufficient to confer personal jurisdiction over all alleged conspirators (*Id.* at 5).

Matters of personal jurisdiction may be raised at any time. *Board v. WHI*, 292 F.2d 1061 (10th Cir. 1993). Even if Lexecon's bare allegation as to conspiracy were sufficient to survive a provisional challenge pre-discovery, that did not bar a renewed challenge after discovery. *E.g.*, *Welinsky v. Resort of the World*, 839 F.2d 928, 930 (2d Cir.

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[5] While Lexecon was preparing the filing of its case in Chicago, its lawyers concluded that Illinois did not have long-arm jurisdiction over the Cotchett Defendants and that the lawyers would be faced with a "Rule 11 problem" if they asserted it (CR 310, Ex. C).

1988). The burden on Lexecon post-discovery was different from what it was when Judge Zagel ruled provisionally pre-discovery: it had to make a *prima facie evidentiary* case; bare *allegations* were no longer sufficient. *E.g., United Bank of Kuwait v. James M. Bridges*, 766 F.Supp. 113 (S.D.N.Y. 1991).

In response to Lexecon's first motion to refer and remand, Cotchett renewed their challenge to personal jurisdiction over them in Illinois (CR 309, Pt. IV, 310). Lexecon's response was merely to cite to the transferor Court's provisional ruling as to the allegation of conspiracy (CR 321, p. 12). It made no attempt to identify a single act of any of the Cotchett Defendants in Illinois (*Ibid*).

Assuming, *arguendo*, that the co-conspirator theory of personal long-arm jurisdiction could pass constitutional muster,[6] the "cases are unanimous that a bare allegation of conspiracy" is "not enough." *Stauffacher v. Bennett*, 969 F.2d 455, 459-60 (7th Cir. 1992).

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[6] *See, Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("the requirements of *International Shoe* [mandating minimum contacts] must be met as to *each* defendant over whom a state court exercises jurisdiction") (emphasis added); *Kipperman v. McCone*, 442 F.Supp. 860, at 873, fn. 14 (N.D.Ca. 1976) (the contention that personal jurisdiction, the exercise of which is governed by strict constitutional standards, may depend upon the imputed conduct of a co-conspirator is "frivolous"); Note, *Long-arm Jurisdiction and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Columbia L. Rev. 506 (1984) ("theory may contravene constitutional commands" and "may lead to unconstitutional results" pp. 506, 536); Althouse, *The Use of a Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, at 253 (1983).

In response to Lexecon's renewed motion to refer for remand (CR 409), Cotchett again renewed their jurisdictional challenge (CR 443, Pt. II-III; 476, Pt. II), with the same lack of response from Lexecon except to merely cite to the transferor Court's provisional opinion as to the conspiracy allegation (CR 468, pp. 14-15).

The issue of personal jurisdiction over Cotchett in Illinois was relevant to Lexecon's transfer motions and Cotchett's cross-motion. It is contrary to the policies of judicial economy, efficiency, and finality to transfer a case to a district where there is doubt as to personal jurisdiction. Such doubt should be resolved by transfer to a district where there is no such issue (*e.g.*, Arizona in this case). *Sparling v. Hoffman Construction Co.*, 864 F.2d 635, 639 (9th Cir. 1988).

F. Estoppel.

Finally, Lexecon should be estopped from contending that the transferee Court lost its authority to rule on dispositive pre-trial motions when it filed its motion to refer for remand. Thereafter, Lexecon invoked that very authority, without express reservation, benefitted from it, and accepted a significant monetary benefit. *See, e.g., Rosen v. Rae*, 647 P.2d 640 (Ariz. App. 1982); *In Re Denney*, 135 F.2d 184, 186 (7th Cir.) *cert. denied sub nom. Denney v. Fort Recovery Banking Co.*, 320 U.S. 474 (1943); 4 *C.J.S.* Appeal & Error § 193 (1993). *See generally, Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977).

III

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A RULE 12(b)(6) DISMISSAL OF STATE LAW CLAIMS OF MALICIOUS PROSECUTION AND ABUSE OF PROCESS BECAUSE THE DISTRICT COURT TOOK JUDICIAL NOTICE OF UNDISPUTED PRIOR PROCEEDINGS AND ORDERS IN THE UNDERLYING CASE.

It is well established that, in considering a Rule 12(b)(6) motion, courts may take judicial notice of items of public record. *Papasan v. Allain*, 478 U.S. 265, 268, n. 1 (1986); *Shaw v. Hahn*, 56 F.3d 1128, 1129, n. 1 (9th Cir.), *cert. denied*, 116 S.Ct. 418 (1995); *Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir. 1994); Wright & Miller, *Fed. Prac. & Proc.* § 1357, p. 299 (1990) and cases cited.

This accepted practice has particular application to claims for malicious prosecution and abuse of process since they are the result of prior legal proceedings. Matters of record may be dispositive of one or more elements of those claims. For example, if there is a judgment in favor of the plaintiff in the underlying case, it cannot reasonably be argued that the court in the second case should blind itself to that record fact and allow the second case to proceed. Under Lexecon's view, the second court would have to accept as true an allegation of favorable termination even if a judgment of record in the underlying case were to the contrary. As observed by the Court of Appeals, that contention elevates formalism beyond its proper place. It is also contrary to the policies of judicial economy, efficiency, and finality. *See Caterpillar, Inc. v. Lewis, supra; Montana v. U.S., supra.*

The District Court properly took judicial notice of the public record in *Lincoln Savings*, including law of the case orders that were ultimately merged into the final judgment (from which Lexecon did not appeal) and became *res judicata*. *See Montana v. U.S., supra,* 440 U.S. at 153. Those matters of record included Orders which had a direct bearing on elements of Lexecon's claim. For example, the claim that *Lincoln Savings* was terminated in Lexecon's favor was adjudicated false in the final Order of December 31, 1992.

Another example relates to the existence of probable cause for the *Lincoln Savings* claims against Lexecon. Probable cause is a question of law in Arizona, and also under a Noerr-Pennington immunity analysis. *Bradshaw v. State Farm*, 758 P.2d 1312, 1321 (Ariz. 1988); *Professional Real Estate v. Columbia Pictures*, 508 U.S. 49, 64-66 (1993). That issue of law is decided by judicial hindsight, not at the time the case is filed. *See, e.g., U.S.S. v. Posco Contra Costa County, etc.*, 31 F.3d 800, 810 (9th Cir. 1994). *Hufstedler Kaus & Ettinger v. Sup.Ct.*, 49 Cal. Rptr. 551, 556 (App. 1996).

Here, the record before Judge Roll was fully developed as to what evidence the *Lincoln Savings'* class was relying upon in its claims against Lexecon. There was no need for a trial to identify that evidence. Thus, the existence of probable cause was "purely one of law" (*Professional Real Estate, supra,* at 67, Souter, J., concurring), and properly decided on a Rule 12(b)(6) motion (*Ibid*).

Finally, if the record on appeal supports dismissal under Rule 56, a judgment of dismissal under Rule

12(b)(6) should be affirmed even if it were error to dismiss under Rule 12. *E.g., Hirrill v. Merriweather*, 629 F.2d 490, 495 (8th Cir. 1980). This is part of the accepted policy that an appellate court should affirm if the result is right even if the lower court ruled for the wrong reason. Any other rule would be contrary to the overriding policies of judicial economy, efficiency, and finality. *See generally, Caterpillar, Inc. v. Lewis, supra; Montana v. U.S., supra.*

CONCLUSION

The Petition for a Writ of *Certiorari* should be denied. If granted as to Petitioners' Question No. 1, it should be granted only with respect to the judgment after trial entered in favor of the Milberg Defendants since that question does not apply to the judgment obtained by pretrial motions by the Cotchett Defendants.

Respectfully submitted,

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Dated: April 17, 1997

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	MDL Docket No. 834 CV 93-1087 PHX JMR
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, et al., Defendants.	**ORDER** (Filed June 7, 1995)

The Court having previously granted summary judgment in favor of defendants Cotchett, Illston & Pitre, Joseph Cotchett, and Susan Illston, and there being no just reason for delay of entry of a final judgment in their favor pursuant to Rule 54(b), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that plaintiffs' claims against said defendants **ARE DISMISSED WITH PREJUDICE.**

Dated this 2nd day of June, 1995.

/s/ John M. Roll
JOHN M. ROLL
United States
District Judge

APPENDIX 2

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.	)	MDL Docket No. 834
LEXECON INC. and DANIEL R. FISCHEL, Plaintiffs, vs. MILBERG WEISS BERSHAD HYNES & LERACH, a partnership, *et al.*, Defendants.	)	No. CIV 93-1087 PHX JMR Hon. John M. Roll, *Judge Presiding*

NOTICE OF APPEAL

Notice is given that plaintiffs Lexecon Inc. and Daniel R. Fischel hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered on November 29, 1993 granting in part the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston to dismiss the Amended Complaint, the Order

entered on December 15, 1994 denying plaintiffs leave to file their proposed Second Amended Complaint, and the Order entered on April 24, 1995 granting the motion of defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston for summary judgment on plaintiffs' remaining claims, all of which are final judgments with respect to defendants Cotchett, Illston & Pitre, Joseph Cotchett and Susan Illston as a result of the district court's entry of a Rule 54(b) certification on June 7, 1995.

Dated: July 3, 1995

Respectfully submitted,

/s/ A. Bates Butler III
One of the attorneys for
plaintiffs Lexecon Inc. and
Daniel R. Fischel

APPENDIX 3

[DOCKET SHEET EXCERPT]

On June 7, 1995 an order was entered granting the Cotchett defendants' motion for a certification of the judgment in their favor under Rule 54(b).

3. Issues Proposed To Be Raised On Appeal

Whether the district court erred in dismissing plaintiffs' abuse of process, malicious prosecution and several defamation claims under Rule 12(b)(6) and in refusing to permit plaintiffs to file a proposed Second Amended Complaint on the ground that it also failed to state a claim.

Whether the district court erred in granting summary judgment on the remaining claims for tortious interference, defamation, commercial disparagement and violation of the Illinois Consumer Fraud and Deceptive Practices Act.